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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 82-

CENTURY AIR FREIGHT, INC.,
Petitioner,

against

CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

1. Was the Congressional policy for the protection of thes shipping public, expressed in the 1977 enactment of § 1002 (k) of the Aviation Act; 49 U.S.C. § 1482 (k), mandating common carrier status and obligations upon air cargo carriers for the era of deregulation, violated by substantive orders of the Civil Aeronautics Board ("CAB") approved by the judgment of the Court below, sanctioning and allowing a covered aircraft operator, by settlement agreement with the agency, to select or reject shipper customers as the carrier perceives comparative profitability to itself in making the selection?

2. Although neither the CAB's order herein nor the judgment of the Court below mention § 1002 (k) of the Aviation Act nor utter the phrase "common carrier", notwithstanding the statute was petitioner's principal ground for objection thereto, and the Court judgment explicitly holds, "Nor was there error in allowing American Airlines to refuse reasonable requests for service • • •", whether it is not compellingly important to measure the validity of the administrative suspension of the duty to carry on reasonable request against the new Congressional mandate repeatedly defining "air transportation of property" as meaning "the carriage by aircraft of property as a common carrier for compensation or hire • • •"?

3. In this antitrust case acquired from the district court by the agency's assertion of primary jurisdiction of the cause where the exclusionary space allocation practices claimed violative of the antitrust laws would, if so found, necessarily also be violative of the Aviation Act, whether the CAB could properly refuse to consider and rule upon the validity of the practices under antitrust while approving them as valid under the Aviation Act, and whether such a ruling of Aviation Act validity would not necessarily be improperly prejudicial to the antitrust claim?

• • • • • •

The caption of the case in this Court contains the names of all parties to the proceeding in the Court below.

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The Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court.

1. The impact, meaning and application of the 1977 Congressional mandate of § 1002 (k) of the Aviation Act, 49 U.S.C. § 1482 (k), imposing common carrier status and obligations upon freight air carriers in the interest of protecting the shipping public in the era of deregulation ought to be settled here to evaluate the validity of a Civil Aeronautics Board settlement allowing a direct air carrier

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to select or reject shipper customers as the carrier perceives its own best economic interest, and to refuse reasonable requests for the service it holds itself out as offering to the public. Such adjudication is both necessary for the proper disposition of this case and would resolve fundamental questions of great public importance at the very threshold of air transport deregulation 22

2. It was error to allow the CAB, without hearing and refusing to rule on antitrust, to hold as valid under the Aviation Act the same practices complained of as violative of antitrust; practices prevailing when the adminstrative complaint had issued. The CAB has a duty to inquire the legality of its orders under any applicable law, and it cannot leave Century with the burden of convincing the district court that the same practices found valid under the Aviation Law are also violative of antitrust 31

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CIVIL AERONAUTICS BOARD and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case.

Opinions Below

The Memorandum Judgment of the Court of Appeals will not be published. A notation of the Court's action has not yet been published in the Federal Reporter.

The Memorandum Order of the Civil Aeronautics Board herein dated July 29, 1981 bears No. 81-7-138, is available in slip sheet form, and has not yet been published in the CAB Reports.

The Memorandum Consent Order of Hon. John M. Vittone, Administrative Law Judge, dated April 17, 1981 bears No. 81-4-116, is available in slip sheet form, and has not yet been published in the CAB Reports.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated as filed on April 21, 1982.

The jurisdiction of this Court is invoked pursuant to § 1006(f) of the Civil Aviation Act of 1958, as amended; 49 U.S.C. § 1486 (f), and 28 U.S.C. § 1254 (1).

Reason for Granting the Writ

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

Statutes and Regulations Which the Case Involves

Aviation Act, § 1002 (k); 49 U.S.C. 1482 (k)

§ 1002 (k) Definitions

"(k) (1) For purposes of this section, the term 'interstate air transportation of property' means—

(A) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia (other than the carriage by aircraft of property by a common carrier between any pair of points both of which are within the State of Alaska or Hawaii if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State

of Alaska or Hawaii and the other of which is not with the same State); or between places in the same State of the United States (other than the State of Alaska or Hawaii) through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of property as a common carrier for compensation or hire, in commerce between a place in any State of the United States or the District of Columbia and any place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(2) For purposes of this section, the term 'overseas air transportation' means—

(A) the carriage by aircraft of persons as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States; or between a place in a territory or possession of the United States, and a place in any other territory or possession of the United States;

(B) the carriage by aircraft of property as a common carrier for compensation or hire in commerce between a place in any State of the United States, or the District of Columbia, and any place in a territory or possession of the United States, or the District of Columbia, and any place in a territory or possession of the United States (other than

the Commonwealth of Puerto Rico and the Virgin Islands); or between a place in a territory or possession of the United States (other than the Comwealth of Puerto Rico and the Virgin Islands), and a place in any other territory or possession of the United States (other than the Commonwealth of Puerto Rico and the Virgin Islands);

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(3) For purposes of this section, the term 'air transportation of property within the State of Alaska' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are in the State of Alaska if such carriage is part of the continuous carriage of such property and another common carrier provides, as part of such continuous carriage, the carriage by aircraft of such property between any pair of points one of which is within the State of Alaska and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Alaska through the airspace over any place outside thereof, whether such commerce moves wholly by aircraft or partly by other forms of transportation.

(4) For purposes of this section, the term 'air transportation of property within the State of Hawaii' means the carriage by aircraft of property (A) by a common carrier for compensation or hire in commerce between any pair of points both of which are within the State of Hawaii and the other of which is not within such State, or (B) by a common carrier for compensation or hire in commerce between places in the State of Hawaii through the

airspace over any place outside thereof, whether such commerce moves wholly by aircraft or party by aircraft and partly by other forms of transportation." As amended Pub.L. 95-163, §§ 10(b), 18(a)-(e)(1), Nov. 9, 1977, 91 Stat. 1282, 1286, 1287; Pub.L. 95-504, § 37(a), (b), Oct. 24, 1978, 92 Stat. 1741, 1742.

GENERAL RULES FOR ALL-CARGO CARRIERS, ER-1080, November 9, 1978

43 Federal Register 53628, 53631 (November 16, 1978)

DUTY TO CARRY

The Board is also exempting carriers in domestic cargo transportation from the duty under section 404(a) of the Act to carry on reasonable request, for the reasons stated in EDR-359 (pp. 14-15). Many respondents opposed this exemption, claiming that the carriers would take advantage of their freedom from a legal duty to carry by refusing to transport out-sized, perishable, and other kinds of cargo, such as live animals.

This exemption, however, does not relieve the carriers of their service obligations as common carriers, and does not apply to a carrier's duty to refrain from providing preferential treatment to particular companies or persons. Carriers holding certificates under section 401 or 418 of the Act remain, by definition, common carriers. The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption, therefore, only ends the

Board's role in regulating the extent of the carriers' service offerings, * * *

GENERAL RULES FOR ALL-CARGO CARRIERS, ER-1080, November 9, 1978

43 Federal Register 53628, 53637 (November 16, 1978)

Subpart D—Exemptions for Domestic Cargo Transportation

§ 291.30 General.

The following exemptions, except as otherwise specifically noted, apply only to domestic cargo transportation. They do not relieve a carrier from obligations derived from other transportation.

§ 291.31 Exemption from the Act.

Each direct air carrier providing domestic cargo transportation is, with respect to such transportation, exempted from the following sections or subsections of the Act:

* * * *

(b) Subsection 404(a), except for air transportation of property within the States of Alaska or Hawaii, and (for all domestic cargo transportation) except the requirement to provide safe and adequate service, equipment, and facilities in connection with that transportation.

The foregoing exemption is published in the Code of Federal Regulations at 14 C.F.R. 291.31 (a) (2).

Additionally, the texts of the following pertinent statutes are set forth in Appendix 4 to this petition:

Aviation Act sections 102 (a)(7), 404 (a) and (b), 411, 412 and 414.

Sherman Antitrust Act, sections 1 and 2.

Administrative Practices Act, 5 U.S.C. sec. 706, Scope of Review.

Statement of the Case

This case centers on the domination of the New York City to San Juan, Puerto Rico air freight trade by American's containerized all-cargo flight, No. 841, flying on a daily schedule weekdays from New York to San Juan during the late night-early morning hours. That schedule, in a large capacity 707 aircraft, enabled air freight forwarders having access to that facility to pick up cargo throughout the metropolitan New York area during the day, consolidate it into containers to be flown to San Juan that night in ample time for breakout from consolidation in San Juan and delivery to consignees throughout Puerto Rico the following day, thus affording to those forwarders on board the ability to provide their shipper customers a "next day" service. Started by American in February, March 1971 as an incident of its takeover of Trans Caribbean Airways, Inc., the service afforded by Flight 841 was unique and nothing on that route offering a comparable service existed.

Century, on receiving its operating authorization from the CAB as an air freight forwarder in June, 1971, immediately requested container space aboard Flight 841, but notwithstanding more than 100 such requests of record for container space before May 5, 1977 when it started its district court antitrust action against American, it is undisputed that not a single container of Century's goods had been carried on Flight 841. Not until September 1977, four months after the start of suit, did American give Century a one-container standing allocation aboard Flight 841. Until then the embargo was complete.

The District Court Complaint*

An air freight forwarder, an "air carrier" licensed by the CAB, is a consolidator of the cargo of its customers

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*The Joint Appendix in the Court of Appeals, constituting the record herein ,will be certified to this Court pursuant to its Rule 19 (1) and (2).

to whom it issues its own airway bill of lading. Forwarders are both the consignors and consignees (at their destination depots) of the consolidated cargo given to the aircraft operator, the "direct' 'carrier. The direct carrier who gets paid by the forwarder is thus relieved of the diffuse collecting, receiving and bookkeeping functions and of the overhead expense entailed in such operations. Hence American allocated all 12 of its main deck container positions to air freight forwarders.

A salient feature of the trade to and from Puerto Rico is that Puerto Rico consistently imports more goods than it exports, with the result that in-bound freight accommodations are generally tight while outbound accommodations are generally comfortably adequate. At the same time most customers demanded a next day service for their goods and it was a competitive necessity for success as an air freight forwarder to be able to furnish such a service.

The embargo made it impossible for Century to function as a mainstream forwarder furnishing a comprehensive New York-San Juan service. That it survived at all was because of the relative ease in obtaining northbound carriage from San Juan to New York. Here not only did Century find accommodation with other airlines, it very early obtained standing allocations for two container positions aboard American's Flight 840, the northbound turnaround flight of the Flight 841 aircraft, going from San Juan to New York. The end result was a distortion in Century's growth so that it developed three times more northbound custom than it had southbound, and could not accept more southbound carriage because it could not get the lift for it.

In all of this time American never gave less than an allocation for 8 out of Flight 841's 12 main deck container positions to Profit By Air, Inc., a forwarder in competition with Century. And for that symbiosis between American and Profit By Air, the complaint relates a background.

Century is family enterprise whose principals are James Cirami and Salvatore Cirami, son and father. In the 1960's, conducting business in corporate form, they had been prominent in local trucking service to and from the airports in New York and in Puerto Rico; in fact, at the time of American's acquisition of Trans Caribbean Airways, Inc., the move which brought American into the Puerto Rico market, Cirami trucking enterprises were the contracted local haulers for Trans Caribbean both in New York and in Puerto Rico. American made plain its hostility to continuing the Cirami trucking concerns as its contracted local haulers; soon the trucking concerns ceased to be operative and thereafter they continued to exist only as litigating adversaries to American. The Ciramis, without a livelihood as truckers, became air freight forwarders.

Profit By Air, whose principal is one Harvey Pittluck started in business in 1969 and used Cirami both as its local trucker in New York and in San Juan, and, invaluably to its interest, as its entry to customers. Aware that the entry of the Ciramis, with their intimate customer contacts developed over years of trucking service would be formidably competitive should they ever secure a forwarder's license, Pittluck, through an adroit ethnic slur that the Century application represented a Mafia-racketeering entry into the air freight forwarding industry, succeeded in having the CAB delay forwarder's licensure to Century from February 1970 to June 1971—which was time enough for American, starting up with Flight 841 in February, March 1971, to fill the Flight with container allocations, awarding the lion's share to Profit By Air. And thereafter, notwithstanding the requirement of § 404 (a) of the Act that it was American's duty to furnish transportation on reasonable request therefor, American refused to carry as much as a single container of Century's goods aboard Flight 841.

The complaint seeks treble damages and a Clayton Act injunction.

Primary Jurisdiction

In the district court, prior to answer, American moved to dismiss the action on the ground that exclusive primary jurisdiction of the cause lay in the CAB. Declining to be a complainant to the CAB, but agreeing that the presence in the complaint of a prayer for injunctive relief entitled the CAB to an opportunity to decide what, if any, action the CAB desired to take with respect to the case, Century stipulated in open Court to give the CAB that opportunity. On October 21, 1977, Court and counsel received a letter from the Board's Enforcement Counsel saying in pertinent part:

> "In an attempt to set a course of action by common accord, the undersigned Enforcement Attorney has been in contact with counsel for both parties in the past week. In several telephone conversations, I have apprised them of the Board's view of the applicable law and of its general concern with this matter. They have both agreed that the public interest warrants that the Board conduct an investigation of its own through the Bureau of Enforcement, and I have informed them that it is the Board's intention to commence such an investigation as soon as time permits. I have advised both counsel that, with their permission, I would suggest to the presiding District Judge that he stay the present proceeding pending the outcome of this investigation. This would avoid duplication of effort and the possibility of the court and the Board reaching conflicting results. At the same time, a stay, as opposed to a dismissal, would prevent Plaintiff's monetary claim from being unfairly extinguished by the statute of limitations.
>
> "I have also advised both counsel that at the conclusion of the Board's investigation, this matter, which will now be treated as a formal complaint, will either be dismissed or made the subject of an enforcement

proceeding, depending upon the results of that investigation. Both counsel understood the risk and the benefit that each of these results presents to their clients. They have also been informed and recognize that should circumstances warrant it, the Board is empowered to enforce the Act and the antitrust laws either in an administrative proceedings or in an action brought in federal court, and that in the latter event, the doctrine of primary jurisdiction would not require any further referral to the Board in its adjudicative capacity, as was held in *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 489 F.2d 251 (2 Cir. 1974)"

Accordingly the district court action was stayed.

Just about a month before, in September 1977, American had, by direct arrangement with Century, granted Century a one-container allocation aboard Flight 841, subject to a right on American's part to break such shipment out of containerization and carry it loose.

A few weeks after the referral of the case, Congress, on November 9,1977, enacted Public Law 95-163 in anticipation of the preparatory year for deregulation. Part of that enactment was the new 1002 (k) of the Act; 49 U.S.C. §1482 (k), projecting common carrier status for the carriage of air cargo into the era of deregulation.

More than two years elapsed between the primary jurisdiction session of October 21, 1977 and the initiation of the CAB Enforcement Proceeding in the Complaint of the CAB's Bureau of Consumer Protection ("Bureau") of December 14, 1979. Inactive as the case may have been, it was not an uneventful period.

In July 1978 two unrelated events occurred; 1) the CAB announced its intention with respect to the carriage of cargo and to be effective November 9, 1978, to suspend the requirement under section 404 (a) of the Act, 49 U.S.C. §1374 (a) imposing on carriers the duty to carry on rea-

sonable request, and, 2) Shulman Air Freight ceased operations thereby opening 3 of Flight 841's 12 main deck positions for reallocation.

With respect to the Shulman space Century again requested the allocation of some of the vacated space, but got none, the vacated positions being allocated in August 1978 to three relative newcomers hitherto very light in the New York-Puerto Rico trade.

The CAB held public hearings regarding the proposed new regulations for cargo carriage on October 19, 1978. This was followed by the enactment on October 24, 1978 of the Airline Deregulation Act, Public Law 95-504, and the CAB's promulgation, on November 9, 1978 of its General Rules for All-Cargo Carriers, ER-1080; 43 Federal Register 53,620, 53,631 (November 16, 1978) which, while purporting to exempt air freight carriers from the duty to carry on reasonable request, also recognized the common carrier status mandated by § 1002 (k) of the Act, and thus reconciled the administrative action with the statutory mandate:

> "This exemption [from duty to carry], however does not relieve the carriers of their service obligations as common carriers * * *. Carriers holding certificates under section 401 or 418 of the Act remain, by definition, common carriers. * * * This exemption, therefore, only ends the Board's role in regulating the extent of the carrier's service offerings, * * *."

The Administrative Decision to Issue Complaint

On June 22, 1979 the Director of the Bureau wrote separate letters to counsel for Century and for American, respectively advising them of the Bureau's intention to institute an enforcement proceeding against American for violation of the Aviation Act's § 404 (b) prohibiting unfair discrimination and undue preferencing. While feeling that American's actions also violated antitrust, the Bureau

had already unilaterally decided not to prosecute on that account. Thus the letter to American's counsel:

> "We have also concluded, on the basis of information presently available, that there are reasonable grounds to believe that American's practice constituted a violation of Section 1 of the Sherman Act. Specifically, we find it is inconsistent with the 'essential facility' doctrine perhaps best enunciated in *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977) [cert. den. 436 U.S. 956 (1978)]. The relevant market at issue here is confirmed air freight traveling from New York City to San Juan, Puerto Rico on regularly scheduled cargo service. American's service constituted a facility essential to successful operations in this market. Since, as a practical matter, air freight forwarders are unlikely to be able to duplicate these services, they should be allocated on fair terms. Therefore, in foreclosing the use of American's services, both American and Profit-By-Air may have violated the antitrust laws. *Hecht, supra,* 570 F. 2d at 992; *see also, Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1972). By implication, any such violations would also constitute unfair methods of trade within the meaning of Section 411 of the Federal Aviation Act. See, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948). • • •
>
> "By July 29, 1979, the Bureau will determine what further course of action should be taken here."[10] • • •

American's response to the Bureau's letter was a position letter of September 18, 1979 admitting the special and protected relationship between Profit By Air, Inc. and American, where Profit By Air had the exclusive car-

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"[10] We have already decided to take no action of our own in response to Century's antitrust claim. Our reasons for doing so are stated more fully in our letter to Century's counsel, • • •."

riage of the entire pharmaceutical industry of Puerto Rico and regularly filled 8 northbound container positions on Flight 840. American's preferencing of Profit By Air was admitted but defended as necessary to "meet competition", since American felt that yielding of any Profit By Air space to Century would likely cost American its best customer.

That yielding *any* space at all aboard Flight 841 to Century would hardly be appealing to Profit By Air became at once apparent the following month when one of Shulman Air Freight's successors to its container allocation gave up its one-container position allocation because it had lost its principal customer to Century. For seven weeks in October and November, 1979 Century had a second container allocation aboard Flight 841 and thus had a significant one-sixth of the Flight's main deck capacity as against the token one-twelfth. This could not be abided and American withdrew the allocation from Century under a new policy announcement that henceforth, starting with Century, vacated container positions would not be allocated but would be filled each night on *ad hoc* spot demand. The remaining eleven main deck positions would be grandfathered to the existing allocation holders until severally relinquished by a process of attrition. Thus was Century cut back to the one-customer allocation given it after the initiation of the district court suit.

On December 14, 1979 the Bureau issued its administrative complaint alleging:

> "• • • American has provided the only regularly scheduled all-cargo service between New York and San Juan departing during prime time on weekdays. • • •",

and,

> "By denying the requests of forwarders seeking actively to compete in the New York-San Juan cargo market for commitments for main deck positions on

> Flight No. 841 in favor of providing continuous, standing commitments to incumbent forwarders, American has violated Section 404 (b) of the Act. This practice has caused the public injury by denying it the benefits of fully competitive freight forwarding service in this market and by preventing new entrants from being established in this market."

The relief requested by the Bureau would, *inter alia*, require

> "• • • American Airlines, Inc. to cease and desist from allocating space on its southbound freighter operating between New York, New York and San Juan, Puerto Rico in an unjustly discriminatory manner and to institute reasonable practices with respect to its providing main deck space for the transportation of air freight in this market."

The issuance of the formal administrative complaint instituting the Board's enforcement proceeding marked the point at which the CAB, relinquishing its absolute right under an unchallengeable public interest determination provided by § 411 of the Act (49 U.S.C. § 1381) *not* to prosecute a proceeding, nevertheless elected to go forward and thereby become bound to follow applicable rules of substantive and procedural law subject to judicial review under the Administrative Procedures Act, 5 U.S.C. § 706. At that point Century's status as a party to the administrative proceeding was established and, with that status, it became entitled to a Board disposition in accordance with law and due process guarantees.

American answered the administrative complaint and several prehearing conferences were held before two successive administrative law judges. The case never went to hearing. Instead the parties—Bureau, American and Century—went into settlement conferences from which Century early dropped out of participation.

Finally, on August 13, 1980, the Bureau brought on its motion before Administrative Law Judge Switkay to approve the settlement—consisting of Appendicies "A", a Memorandum of Agreement between the Bureau and American, and "B", the Allocation System, both of which are identical with the Appendices "A" and "B" annexed to the subject final Order of the CAB constituting Appendix 2 to this petition. Also annexed to the motion papers was a proposed consent order which was considerably modified by the administrative law judge in his actually issued Consent Order of April 17, 1981 constituting Appendix 3 to this petition. The motion for approval of the settlement and proposed consent order submitted therewith are set forth in Appendix 5 to this petition.

It is the settlement agreement—Memorandum of Agreement and Allocation System—which we feel is the heart of the case for certiorari. Like any written instrument, and especially contractual instruments under the parol evidence rule, construction is for the tribunal passing upon it and in an unambiguous instrument such as this, that construction is a matter of law. The fuzziness of the language used in the Allocation System is deliberate, not ambiguous; its purpose is to hint at, but not impose, criteria and restraints. Nowhere does it compel a change in the southbound allocations existing before the CAB asserted its primary jurisdiction of the cause with eight positions for Profit By Air and one position for Century. Even the concession of one southbound position as of right for each steady northbound shipper of one or more containers—the only truly binding provision in the agreement—is deliberately designed to assure that no shipper—like Century—can ever, against American's will, get more than one southbound container allocation on Flight 841. At the same time the great bulk of the container positions are put in American's sole discretion for disposition in an annual reallocation that requires no changes whatsoever if no changes are what American desires. Of the 12 north-

bound positions, of which Profit By Air holds eight on allocation and Century hold two, the one container as of right provision assures that one each is pledged to Profit By Air and Century, leaving a minimum of eight at American's disposal, plus possibly one or two more as there are or are not steady northbound shippers using the remaining two container positions. Add to this that the settement agreement positively discourages the voluntary award to Century of a second or third container allocaion aboard Flight 841 since for Century, and Century alone, additional positions aboard that flight are objects of special trade. Thus Appendix A, the Memorandum of Agreement between the Bureau and American:

> "10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck "A" container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century."

And where for all of this unbridled control in the selection and rejection of customers for allocation of space on Flight 841, where the Bureau had been of the opinion that both the antitrust and aviation acts were being violated and had initiated its enforcement proceeding for appropriate cease and desist remediation, it is ironic that the Bureau had now come full circle and now validates a panorama of virtually absolute control by American of access to its essential facility, Flight 841.

Century's Comments of August 28, 1980, submitted in opposition to the Bureau's motion to approve the settlement, raises the objections urged at each stage of the review procedure. The principal ground for opposition was that the settlement violated the common carrier strictures against customer selection and rejection by carriers, and discriminatorily did away with the common carrier

requirement for equitable proration among customers tendering goods for shipment where space was not adequate to meet the aggregate demand. Thus:

> "• • • Rather it seems plain that Congress, by enacting section 1002 (k) and 102 (a)(7) was mandating to the Board the duty to preserve common carrier principles alive among the all-cargo carriers, i.e., to accommodate all shippers tendering the kinds of cargo American would carry, and where such demand exceeded the space, accommodating as equitably as possible, proportionaely within the practicalities of a rule of reason, the allocations of available space."

The Comments also raised the objection that the proposed settlement allowing American to exclude shipper customers from its essential facility was, especially in view of the common carrier status of the faciity, violative of sections 2 and 1 of the Sherman Act and, derivatively, of § 411 of the Aviation Act.

Century's Comments of August 28, 1980 are in Appendix 6 to this petition.

It was not until April 17, 1981 tha a third administrative law judge, Hon. John M. Vittone, issued his Consent Order No. 81-4-116 (Appendix 3 hereto) approving the settlement agreement—the Memorandum of Agreement and the Allocation System—in its entirety. While none of the decsional orders and Judgment in the case mention § 1002 (k) of the Act, Judge Vittone's Consent Order does make solitary mention of the phrase "common carrier":

> "Century has objected to this settlement on the stated grounds that the allocation system grants American 'a right of unbridled customer selection', and would permit American to discriminate against Century in violation of the antitrust laws and common carrier obligations. We find no basis for these objections. Nothing in the allocation system authorizes or makes

it easier for American to select customers unlawfully or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discrimination."

While making it plain that carrier selection of what it deems the "better customers" is perfectly legal, Judge Vittone's Consent Order also seemed to cast doubt on the validity of Century's antitrust claims and hinted that perhaps the settlement agreement extinguished them.

Century petitioned the CAB to review the Consent Order on May 1st, 1981 reiterating the same grounds urged against the Bureau's motion to the administrative law judge. That petition is in Appendix 6 to this petition.

On July 29, 1981 the Board issued its Order No. 81-7-138 (Appendix 2) which, with the Judgment confirming it, is the subject of this petition. Like the Consent Order which it affirmed, it makes valiant rhetorical effort to demonstrate that, beyond American's obligation to furnish one southbound annual container allocation to those steadily shipping one or more northbound containers, the agreement really did put some sort of binding limitation on American's otherwise boundless discretion in the selec- and rejection of customers, a search which examination of the agreement cannot reward.

Unlike the administrative law judge, the CAB Order held that the settlement agreement and the two orders approving it, indeed the administrative enforcement proceeding itself, never touched upon or affected the antitrust suit:

"We also disagree with Century's contention that the settlement validates American's prior practice, for it requires American to allocate space according to certain specified criteria and to pay $50,000 in civil penalties. American will no longer be able to follow its prior allocation practices. In addition, this settlement does not purport to determine whether or not Century should prevail in its private suit against American.

> "Finally, Century's contention that American has been violating the Sherman Act does not require disapproval of the settlement. As agreed to by Century's counsel at the beginning of this proceeding, this case concerns only the allegation that American had violated Section 404(b)'s prohibition against unjust discrimination. The antitrust issues presented by Century's district court suit, on the other hand, were never encompassed within this proceeding. Those issues were reserved for trial in the district court suit. Accordingly, Century's antitrust claims provide no basis for disapproving the settlement before us."

While the facts will readily demonstrate that there was no consent by Century's counsel to amputate the antitrust case out of its common and indivisible fact matrix in the district court and administrative cases, it still does not follow that the CAB need not concern itself with the antitrust implications of a settlement whose legal validity it is declaring by its Order of approval; and all the more where a violation of antitrust is, derivatively and necessarily, a violation of section 411 of the Aviation Act.

The Court below, whose jurisdictional base was § 1006 of the Aviation Act, 49 U.S.C. § 1486, dismissed Century's petition to review in its unpublished Memorandum Judgment of April 21, 1982 (Appendix 1). The grounds advanced were that there was no reversible error in the agency action, no requirement for the CAB "to resolve petitioner's antitrust claims if, given the terms of the settlement, further proceedings were not in the public interest", and seeming approval of the CAB holding that Century's antitrust action was not prejudiced by the CAB Order which "does not state or imply that American's

conduct between 1971 and 1981 did not violate the anti-trust laws."

Not in the record are the following facts. In the beginning of August 1981, American executed a change of schedule which substituted a daytime daily freighter and discontinued Flight 841. Counsel for American, on May 8, 1981, gave written notice of the planned change of schedule to the CAB and to all the parties and participants of record in the administrative proceeding. Nevertheless the CAB, with evident care, attention and awareness of the importance and public interest of and in the questions with which it was dealing, issued its subject Order herein —oriented to the merits and validity of a system of selection of cargo shippers for annual allocations of space— with the date of issue July 29, 1981, just two days before the last flight of Flight 841. The route itself is actively maintained by American and there is no physical hindrance at any time to American's reactivating Flight 841.

Argument in the Court below was almost totally directed to the issue of mootness, but the Memorandum Judgment which issued in the following week was directed wholly to the merits of the case under review.

We feel that, unlike the formula invocation of public interest or lack of public interest in the administrative determination to go forward or to dismiss, pursuant to § 411 of the Act, the public interest in the purely legal and fundamental question which this case presents—the meaning and impact of § 1002 (k) of the Act on the basic rules for air transportation of cargo in the era of deregulation— is intense. We strongly urge the Court to grant certiorari and act on the merits of the case, for if it does not, the ambious rule laid down by the CAB which neither mentions § 1002 (k) nor the concept, let alone mandate, for common carriage, will prevail for an indefinite time. We feel that Congress by enacting § 1002 (k) intended the industry's footing to be on a basis of common carriage.

In this connection we feel that *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897) is potent authority for retention and merit adjudication, p. 307:

> "The defendants object to the hearing of this appeal, and ask that it be dismissed on the ground that the Trans-Missouri Freight Association has been dissolved by a vote of its members since the judgment entered in this suit in the court below
>
> "• • • we think the fact of dissolution of the association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits.
>
> "The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things that the defendants should be restrained from continuing in a like combination and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill but that the defendants should be enjoined for the future."

ARGUMENT

The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court.

1. **The impact, meaning and application of the 1977 Congressional mandate of § 1002 (k) of the Aviation Act, 49 U.S.C. § 1482 (k), imposing common carrier status and obligations upon freight air carriers in the interest of protecting the shipping public in the era of deregulation ought to be settled here to evaluate the validity of a Civil Aeronautics Board settlement allowing a direct air carrier to select or reject shipper customers as the carrier perceives its own best economic interest, and to refuse reasonable requests for the service it holds itself out as offering to the public. Such adjudication is both necessary for the proper disposition of this case and would resolve fundamental questions of great public importance at the very threshold of air transport deregulation.**

That § 1002 (k) of the Act has direct and important bearing on this case is at once apparent. Invoked by Century from its very emergence as a statute, both the agency and the Court of Appeals refuse to come to grips with it and it goes unmentioned in all three of the decisional papers of Court and agency. One inference is clear; if the statute had been deemed supportive of the agency action, it would not have been left to languish in silence and under a bushel.

While some may have viewed the statutory provision as of little or no consequential effect on the power of the agency to establish, implement and help a cherished policy of setting up for the air cargo carriage industry a *laissez faire* deregulated market economy akin to the private sector, where supply and demand, profitablity and the avoidance of loss, allowance of large room for the exercise

of entrepreneurial brains, and the like, would all hopefully result in an economically healthy industry standing on its own two feet, no one of that belief and commitment could have viewed § 1002(k) as a help to the cause. Left to slumber as a dead letter, it would do no harm. Brought out to be discussed of record, it does have a potential for precipitating a clash if it is viewed as a Congressional mandate at odds with agency policy, and, if indeed there is a clash, the mandate must prevail.

In this instance we feel that the anticompetitive, market rigging power given to American was more than was good for it or for the industry. Century is urging here that the solicitude of the agency for the industry it is turning loose into a frustrating deregulation is, morally and ethically, at least matched by the solicitude of Congress for the shipping public, a manufacturing, mercantile and commercial community who generally, with regard to transportation services, stand nowhere near equal on a bargaining footing with their carriers. In this situation where law is the arbiter, we feel that the common carriage mandated by Congress cannot be allowed to be subverted by conflicting administrative policies. But even more than Century's feelings as to who has the right of it, we feel it is objectively demonstrable that this Court ought to take the case in hand by granting certiorari.

We feel that when Congress, in its enactment of § 1002 (k) of the Act, said "* * * the term 'interstate air transportation of property' means * * * the carriage by aircraft of property as a common carrier for compensation or hire * * *", it meant just what it said and had no intention of having the basic, well understood phrase "common carrier" distorted into meaning something which is the very opposite of the common understanding of the term. Yet the Bureau's motion states:

> "Beyond the initial guarantee that anyone providing northbound shipments will be given one re-

served southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability * * *."

The term "common carrier" has a commonly accepted meaning going back, deep and broad, to a common law fundament. See, e.g., 10 Williston on Contracts (3d Ed. 1967), pp. 2-24. Thus, at pp. 6, 7:

> "It was formerly the merest truism that there were but two classes of carrier: the private carrier and the common or public carrier."

and thus defines a common carrier, p. 11:

> "A common carrier undertakes to transport for hire goods or passengers or both for all who reasonably apply, according to the method of transportation which it offers to the public."

and at p. 13:

> "The common carrier status imposes the common-law relational duties of rendering to the public on reasonable demand a reasonable service at reasonable rates and without unreasonable discrimination."

That a right of customer selection is an important legal attribute in the private enterprise sector is recognized and sanctioned by statute. Thus the pertinent portion of 15 U.S.C. § 13 (a) of the Clayton Act:

> "* * * *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transaction and not in restraint of trade."

And see *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), where McReynolds, J. said:

> "* * * In the absence of any purpose to create or maintain a monopoly, the act does not restrict the

> long recognized right of a trader or manufacturer engaged *in an entirely private business,* freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, *carries on an entirely private business,* and can sell to whom he pleases.' *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 320." (emphasis supplied)

United States v. *Trans-Missouri Freight Association,* 166 U.S. 290, 320, 321 (1891), makes the distinction between strictly private business and enterprise having a public character. There Peckham, J. said:

> "* * * It is said that this meaning is plainly to be inferred, because of *fundamental* differences both in an economic way and before the law between trade and manufacture on the one hand, and railroad transportation on the other. Among these differences are the public character of the railroad business, and as a result the peculiar power of control and regulation possessed by the State over railroad companies. The trader or manufacturer, on the other hand, carries on an entirely private business and can sell to whom he pleases * * * he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction; while, on the contrary, a railroad company must transport all persons and property that come to it, and it must do so at the same price for the same service, and the price must be reasonable, and it cannot at its will discontinue its business." (emphasis supplied)

It is therefore both strange and strained that with the language of a statute recently enacted so plain, unambiguous and direct as § 1002 (k) of the Act, and explicitly

using the phrase "common carrier", that the Board should use a construction so perversely contrary and descriptive of the opposite of common carrier as the "fair" method. That construction defies a plain mandate of Congress and ought not to be allowed to stand.

The Board Order generates a rule that unless overruled and corrected will enslave the shipping public, force them to negotiate terms as with a contract carrier, or forego transportation which has been pre-empted by the preferenced.

Nor is there any persuasive argument for making the situation of an excess of tendered shipments over available space into an occasion empowering the carrier to preference his favored shippers and reject the others. In such a situation, the status of common carrier requires equitable proration:

> "First, where the demand for space exceeds the supply, a common carrier must equitably prorate its available space among shippers. * * *" *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 278, 284 (1957)

And see: *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U.S. 121 (1915)

United States v. *Baltimore & O. R. Co.*, 165 Fed. 113 (4 Cir. 1908), reversed on other grounds, 215 U.S. 481 (1910)

The Court below cited its decision in *National Small Shipments Traffic Conference* v. *CAB*, 618 F. 2d 819 (D.C. Cir. 1980) as the authority supporting the CAB Order "allowing American Airlines to refuse reasonable requests for service on such a flight." We think that *National Small Shipments* is consistent with the narrow construction given by the CAB in its General Rules for All-Cargo Carriers of November 9, 1978 (page 5 of this petition) which

limits the administrative exemption of the "duty to carry" provision of § 404 (a) of the Act in a way not to conflict with carriers' continuing common carrier obligations:

> "This exemption, however, does not relieve the carriers of their service obligations as common carriers • • •. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and is not obligated to carry other types of cargo. This exemption therefore, only ends the Board's role in regulating the extent of the carriers' service offerings • • •."

and the case addresses itself to petitioners who are specialty shippers fearful that their categories of goods would be excluded. Thus, 618 F. 2d 819, 832:

> "• • • For the most part, the Shippers' claim rests on their belief that the Board's action [exempting carriers from the statutory duty to carry on reasonable request] will encourage carriers to refuse to carry certain types of cargo, for example, live animals or radioactive materials. • • •
>
> "• • • Given this, the Board reasonably concluded that the market system could be expected to resolve the problem of unpopular cargo under the more competitive conditions now allowed. • • •"

In this case American's service offering is the carriage of containerized cargo and the ground of exclusion has rarely, if ever, addressed itself to the nature of the contents. We petition in this case because the Court below has directly adjudicated that the CAB's exemption of the duty to carry upon reasonable request provision of section 404 (a) of the Act is absolute to whatever extent such action is held not to be in conflict with section 404 (b). To the extent that *National Small Shipments* is now held to approve as valid a general suspension of carriage obligations beyond the self-imposed narrow interpretation of

the CAB, we believe it erroneously transgresses upon rights and obligations mandated by § 1002 (k) of the Act, and, in that sense, reinforces our point that the Court of Appeals has decided an important question which only now, at the petition stage, is before this Court.

Here we claim that § 1002 (k) of the Aviation Act, fastening the status of common carrier upon American is violated by the CAB Order sanctioning selection and rejection of shipping customers on the carrier's appraisal of their comparative value to it as customers. Such violation of its own Act has long been held subject to review and remediation by the courts. Thus in *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958) the Shipping Act forbade "resort to other discriminating or unfair methods" an dthe egency found that the dual rate system approved was fairly designed to meet competition—the same argument advanced by American to justify its preferencing Profit By Air. The Supreme Court, per Brennan, J., struck down the agency action, saying at p. 493:

> "Since the Board found that the dual-rate contract of the Conference was a 'necessary competitive measure to offset the effect of non-conference competition' required 'to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade, it follows that the contract was a 'resort to other discriminating or unfair methods' to stifle outside competition in violation of § 14 Third."

And see *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), where Marshall, J., said at p. 745, 746 regarding the deference due a longstanding administrative misconstruction of law:

> "But the Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should

be given great weight. See, *e.g.*, *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate. * * * It is sufficient to note that the cases do not demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to vest the Commission with the authority it is now seeking to assert. As this Court held in a related context,

> " 'The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law," . . . But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deemed inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S., at 272.
>
> "In this case, we find that the Commission overstepped the limits which Congress placed on its jurisdiction."

See, also: *Federal Security Administration* v. *Quaker Oats Co.*, 318 U.S. 218, 228 (1943)

In enacting § 1002 (k) of the Aviation Act, Congress mandated common carriage status and obligations as the governing characteristic for air transportation of prop-

erty. In this case where we feel that application of the statute is highly material, and where the public importance of the issue is manifest, both the Court below and the agency have, without even mentioning the statute, taken action which we believe is violative of it. We urge that a material Act of Congress expounding important public policy ought to be discussed, evaluated and applied and, for the foregoing reasons, respectfully pray this Court to grant certiorari.

2. It was error to allow the CAB, without hearing and refusing to rule an antitrust, to hold as valid under the Aviation Act the same practices complained of as violative of antitrust; practices prevailing when the administrative complaint had issued. The CAB has a duty to inquire the legality of its orders under any applicable law, and it cannot leave Century with the burden of convincing the district court that the same practices found valid under the Aviation Law are also violative of antitrust.

In this application for certiorari we make no secret of the primacy for consideration and settlement by this Court of the issue of the meaning and impact of § 1002 (k) upon both the statutory and administrative scheme of deregulation. The issues tendered under this second heading are more diffuse; basically concerned with federal due process rights of litigants whose litigation has been moved into an administrative agency under the doctrine of primary jurisdiction. If certiorari is granted, and especially if the settlement terms are found invalid, the issues of this second point will necessarily have to be considered.

The settlement agreement comes off the top of a significant series of events; it is two-dimensional and is utterly lacking in depth. Thus, it ignores over six years of total embargo from June 1971 to September, 1977. Even assuming that the exemption of the duty to carry on reasonable

request in § 404 (a) is unqualified and not limited only to service offerings, the settlement agreement and the Court below treat the right of refusal to carry on reasonable request as though it had existed at all pertinent times when in fact, for Century, it was enduring over seven years of naked violation of that statutory duty, from June 1971 to November 9, 1978. And, of course, all of the advantages gained by American and Profit By Air to Century's great disadvantage in those glaring illegalities find no recognition in the settlement agreement.

Century's transfer into the jurisdiction of the CAB was not voluntary. Bringing suit before any of the deregulation legislation, American made the motion for primary jurisdiction and Century, refusing to be a complainant before the CAB, agreed that the presence of its prayer for Clayton Act injunctive relief entitled the CAB to take the case if the CAB so elected, and the CAB was advised it could accept or decline primary jurisdiction as it chose. It was the CAB that decided to exercise primary jurisdiction over the case and in doing so the CAB represented to the district court that, if it issued administrative complaint, it would try the whole case, reserving the issue of money damages to the court. The district court complaint was treated as Century's formal complaint in the CAB.

On June 22nd, 1979 the Bureau wrote to Century and to American via their separate counsel giving in detail its conviction that American was violating both the Aviation Act and the Sherman Act, the latter by denying access to Century aboard American's Flight 841, an essential facility within the meaning of *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977), cert. denied 436 U.S. 956, but that the Bureau had decided it would proceed only on a charge of violation of § 404 (b) of the Act —illegal discrimination and preferencing. And to this announcement, at a time when no complaint had issued and Century had no right of recourse, the Bureau made

the following proposal for amputating antitrust from the indivisible facts:

"In contrast to an antitrust suit, an administrative proceeding limited to issues arising under Section 404(b) of the Federal Aviation Act could probably be litigated on summary judgment without unduly taxing the Bureau's limited resources. On the other hand, an antitrust suit would likely require a full trial and the presentation of expert testimony. Since the public's protection can be ensured without proceeding with Century's antitrust claim in addition to the one arising under the Federal Aviation Act, we must decline to do so.

"We recognize, however, that the manner in which we received Century's complaint strongly militates against the outright dismissal of its antitrust claim. Therefore, instead of doing so, we suggest that one of two courses of action be followed if Century chooses to continue to prosecute its antitrust claim. First, we invite you to take the initiative of filing a formal third-party complaint on your own with the Board. In that event, I would encourage both parties to submit expert evidence to determine whether a complaint should be docketed. If I decided to do so, the matter could be litigated directly by Century and American with the Bureau participating almost as *amicus curiae*, a procedure recently followed in *Braniff Airways, Inc.* v. *Texas International Airlines, Inc.*, Docket 32872.* Second, Century could return the matter to Federal Court after the completion of administrative proceedings. If this procedure were followed, the Bureau would provide assistance to the Court if called upon to do so. Regardless of which procedure is employed, Century would have the discretion of determining the future of its suit, which we believe is fair given the case's history."

The unbearable prospect in the Bureau's first proposal with two trials of the same facts, burden of proof on the Bureau in the Aviation Act case, burden of proof on Century in the antitrust case (should the Bureau not exercise its veto, without recourse, against administrative trial of the third-party antitrust claim) made the second option by far the lesser of the two evils, and so Century opted in a procedure not so different as the return to district court for assessment of damages after successful administrative proceedings.

Later the Board was to chide Century for having "consented" to the amputation.

And when finally the Bureau issued its Orders, without hearing, approving as valid under the Aviation Act, exactly the practices that were in effect *prior* to the referral of the case to the CAB, it becomes impossible to conclude that Century has not been deprived of its property in its antitrust suit without the due process of a hearing. For it does no good to assure Century that its antitrust suit—after a mauling of five years—is not impaired by the administrative and judicial holdings confirming the validity of its Aviation Law action and holdings. Courts look to the administrative action, especially if it has been judicially confirmed, to evaluate both the law and the facts. Thus *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), at 305:

> "We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, * * *."

and even more pointedly in *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 380 (1973):

> "* * * it would be odd to hold that an affiliation between an air carrier and others that would pass muster under §408 could nevertheless run afoul of the antitrust laws."

Patently once a party litigant comes into the rights of a party under 5 U.S.C. § 706, he is entitled to have his legitimate litigating rights preserved. Here the CAB represented its ability to hear and adjudicate Century's entire case save for assessment of damages. It should be held to that representation.

CONCLUSION

For the foregoing reasons, petitioner earnestly prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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